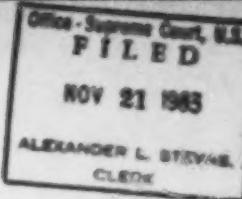


IN THE
SUPREME COURT OF THE UNITED STATES
NO. 83-5352, Misc., October Term, 1983



GREGORY ARNOLD MURPHY,)
Petitioner,)
v.)
COMMONWEALTH OF KENTUCKY,)
Respondent.)

REPLY TO BRIEF IN OPPOSITION

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CERTIFICATE

I do hereby certify that a copy of this Reply was served, by depositing the same in a United States mailbox, with first class postage prepaid, to Hon. Joseph R. Johnson and Hon. Eileen Walsh, Assistant Attorneys General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on November 17, 1983.

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INTRODUCTION

REPLY TO BRIEF IN OPPOSITION

Comes the petitioner, Gregory Arnold Murphy, pursuant to Rule 22.5 of the Rules of this Court and for his reply to the respondent's brief in opposition, states as follows:

RESPONSE TO OBJECTION TO JURISDICTION

Argument-II of the Petition for Certiorari deals with the petitioner's claim that his conviction violated the constitutional principles enunciated in Bruton v. United States, 391 U.S. 12 (1968). The respondent concedes that petitioner raised the Bruton issue at both the trial and appellate levels in the state courts. Nevertheless, the respondent argues that the Bruton issue was decided solely on state grounds (Brief in Opposition, pp. 2-3). There is no merit to the respondent's assertion especially in light of the respondent's initial decision to waive the filing of a brief in opposition herein.

As reflected in the opinion below, the Kentucky Supreme Court was clearly cognizant of the Bruton issue. Murphy v. Commonwealth, Ky., 652 S.W.2d 69, 71 (1983) (Appendix to Pet. for Cert. p. 3). Yet nothing in that opinion suggests that the Kentucky Supreme Court reached its decision solely on independent, state grounds. The excerpts from the opinion cited by the respondent do not dictate a different conclusion and reveal that the Kentucky Supreme Court believed the error to be harmless. (Brief in Opposition, pp. 2-3). Indeed, the respondent's argument is essentially conclusory in nature and is not supported by those portions of the Kentucky Supreme Court's opinion to which this Court's attention is directed.

First, in order for the federal courts to exercise jurisdiction in a case involving a federal constitutional issue, it is only required that the issue be presented to the state courts. As conceded by the respondent, that test was met here (Brief in Opposition, p. 2). Moreover, jurisdiction is properly vested in a federal court even if the state reviewing courts ignore or reject the constitutional claim presented to them. See, Smith v. Digmon, 434 U.S. 332 (1978).

Second, application of the harmless error standard to a constitutional issue itself raises a constitutional issue. See Chapman v. California, 386 U.S. 18 (1967). Thus, the Kentucky Supreme Court's treatment of the Bruton issue is no bar to the exercise of this Court's certiorari jurisdiction. Indeed, in Harrington v. California, 395 U.S. 250 (1969), this Court specifically exercised its certiorari jurisdiction and reviewed a case in which the state courts applied the harmless error standard to a Bruton issue.

For the foregoing reasons, the petitioner respectfully submits that this Court has jurisdiction, pursuant to 28 U.S.C. §1257(3), to review the constitutional errors raised in the petition for certiorari.

REASONS FOR GRANTING REVIEW

In support of its argument that review not be granted, the respondent asserts that "the issues raised in the petition are concerned with unique and isolated fact patterns that are not likely to recur in the Commonwealth of Kentucky or its sister states." (Brief in Opposition, p. 7). Aside from the important questions of constitutional law involved, the petitioner would point out that 1) fifteen other states have accomplice corroboration laws (Pet. for Cert., App. 15), 2) two other states and the Virgin Islands have repealed accomplice corroboration laws (Pet. for Cert., App. 15), 3) the issue has already generated other litigation (Pet. for Cert., p. 14), and 4) the Kentucky Supreme Court, relying on the case at bar has again reached the conclusion. See Phillips v. Commonwealth, Ky., 655 S.W.2d 6 (1983) (Cert. pending sub. nom. Phillips v. Kentucky, No. 83-5662). Moreover, Kentucky law contains no statute of limitations for felonies¹ and recurrence of the ex post facto violation asserted in the petition for writ of certiorari cannot be eliminated.

1. KRS 500.050 (1) states "Except as otherwise provided, the prosecution of a felony is not subject to a period of limitation and may be commenced at any time."

ARGUMENT

I. BY DECIDING THAT FORMER RULE OF CRIMINAL PROCEDURE (RCr) 9.62, WHICH ALLOWED CONVICTIONS ONLY WHEN ACCOMPLICE TESTIMONY IS CORROBORATED, DOES NOT APPLY TO THE CASE AT BAR, THE KENTUCKY SUPREME COURT HAS CREATED AN EX POST FACTO LAW IN VIOLATION OF ARTICLE I, SECTION 10 AND THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Relying on Hopt v. Utah, 110 U.S. 574 (1884) and Dobbert v. Florida, 432 U.S. 282 (1977), the respondent argues that the repeal of RCr 9.62 is procedural and does not constitute a violation of the ex post facto clause. (Brief in Opposition, pp. 9-11). Dobbert, supra, is inapposite insofar as that case deals with procedural changes in the law. In contrast, the case at bar involves a decrease in the quantum of proof necessary to support a criminal conviction. The repeal of RCr 9.62 permits a defendant to be convicted solely on the testimony of an accomplice. While, in effect, RCr 9.62 required that such testimony be corroborated. Clearly, the repeal of RCr 9.62 requires less proof to obtain a conviction. In the absence of the accomplice's testimony, the evidence against the petitioner can hardly be considered overwhelming (Pet. for Cert., pp. 8-9; Brief in Opposition, p. 11). The decrease in the amount of proof required for conviction is exactly the result condemned in Hopt v. Utah, 110 U.S. at 590 as a violation of the ex post facto clause.

II. THE TRIAL COURT'S FAILURE TO DELETE THE PETITIONER'S NAME FROM AN INCRIMINATING STATEMENT GIVEN BY THE CO-DEFENDANT SUBSTANTIALLY PREJUDICED THE PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioner will continue to rely on the arguments made and authorities cited in his Petition for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the petitioner, Gregory Arnold Murphy, prays that this Court grant his petition for a writ of certiorari and review the decision of the court below.

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